

**ASSEMBLY BILL**

**No. 1728**

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**Introduced by Assembly Member Wagner**

January 28, 2016

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An act to amend Section 3295 of the Civil Code, relating to civil damages.

LEGISLATIVE COUNSEL'S DIGEST

AB 1728, as introduced, Wagner. Civil damages.

Existing law authorizes the plaintiff, in an action for the breach of an obligation not arising from contract, when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, to recover damages for the sake of example and by way of punishing the defendant in addition to the actual damages. Existing law authorizes the court, for good cause, to grant a defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for exemplary damages prior to the introduction of certain evidence.

This bill would make a nonsubstantive change to those provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1     SECTION 1. Section 3295 of the Civil Code is amended to  
2     read:  
3     3295. (a) The court may, for good cause, grant ~~any~~ a defendant  
4     a protective order requiring the plaintiff to produce evidence of a

1 prima facie case of liability for damages pursuant to Section 3294,  
2 prior to the introduction of evidence of:

3 (1) The profits the defendant has gained by virtue of the  
4 wrongful course of conduct of the nature and type shown by the  
5 evidence.

6 (2) The financial condition of the defendant.

7 (b) Nothing in this section shall prohibit the introduction of  
8 prima facie evidence to establish a case for damages pursuant to  
9 Section 3294.

10 (c) No pretrial discovery by the plaintiff shall be permitted with  
11 respect to the evidence referred to in paragraphs (1) and (2) of  
12 subdivision (a) unless the court enters an order permitting such  
13 discovery pursuant to this subdivision. However, the plaintiff may  
14 subpoena documents or witnesses to be available at the trial for  
15 the purpose of establishing the profits or financial condition  
16 referred to in subdivision (a), and the defendant may be required  
17 to identify documents in the defendant's possession ~~which~~ *that*  
18 are relevant and admissible for that purpose and the witnesses  
19 employed by or related to the defendant who would be most  
20 competent to testify to those facts. Upon motion by the plaintiff  
21 supported by appropriate affidavits and after a hearing, if the court  
22 deems a hearing to be necessary, the court may at any time enter  
23 an order permitting the discovery otherwise prohibited by this  
24 subdivision if the court finds, on the basis of the supporting and  
25 opposing affidavits presented, that the plaintiff has established that  
26 there is a substantial probability that the plaintiff will prevail on  
27 the claim pursuant to Section 3294. Such order shall not be  
28 considered to be a determination on the merits of the claim or any  
29 defense thereto and shall not be given in evidence or referred to  
30 at the trial.

31 (d) The court shall, on application of any defendant, preclude  
32 the admission of evidence of that defendant's profits or financial  
33 condition until after the trier of fact returns a verdict for plaintiff  
34 awarding actual damages and finds that a defendant is guilty of  
35 malice, oppression, or fraud in accordance with Section 3294.  
36 Evidence of profit and financial condition shall be admissible only  
37 as to the defendant or defendants found to be liable to the plaintiff  
38 and to be guilty of malice, oppression, or fraud. Evidence of profit  
39 and financial condition shall be presented to the same trier of fact

1 that found for the plaintiff and found one or more defendants guilty  
2 of malice, oppression, or fraud.

3 (e) No claim for exemplary damages shall state an amount or  
4 amounts.

5 (f) The amendments to this section made by Senate Bill No.  
6 241 of the 1987–88 Regular Session apply to all actions in which  
7 the initial trial has not commenced prior to January 1, 1988.

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